

No. 05-997 FEB 6 - 2006

OFFICE OF THE CLERK

In The
Supreme Court of the United States

GLENN R. BEUSTRING, individually and as
an attorney admitted to practice law in the
State of Oklahoma and a member of the
Oklahoma Bar Association,

Petitioner,

vs.

OKLAHOMA BAR ASSOCIATION,
the agent and an official arm of the
Supreme Court of Oklahoma, through its
General Counsel, Dan Murdock,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A lawyer charged under Oklahoma's disciplinary procedure for exercising his constitutional right to free speech is not afforded the opportunity to present a timely constitutional challenge to those charges. The constitutional challenge cannot be presented until the matter is on final review by the Supreme Court of Oklahoma. This review may occur years after the protected speech and subsequent prosecution. In the case of Petitioner, the protected speech and prosecution occurred in 2003, but the case, including Petitioner's constitutional challenges, has not yet been reviewed by the Oklahoma Supreme Court.

I. Should federal courts apply the abstention doctrine developed in *Younger v. Harris*, 401 U.S. 37 (1971), as applied to attorney disciplinary proceedings by *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982), when the state disciplinary procedures do not afford the lawyer a timely opportunity to present constitutional challenges to the charges brought against that lawyer?

II. If abstention is mandated by *Middlesex* in circumstances where a lawyer is deprived of a timely opportunity to raise his constitutional claim, does application of that doctrine conflict with the rule announced in *Dombrowski v. Pfister*, 380 U.S. 479 (1965) and expanded upon by Justice Brennan in *Perez v. Ledesma*, 401 U.S. 82 (1971), that federal jurisdiction is proper when the state procedures "will not assure adequate vindication of constitutional rights"? *Dombrowski*, 370 U.S. at 485.

PARTIES TO THE PROCEEDING

In the courts below, Petitioner, attorney Glenn R. Beustring, sought relief from disciplinary proceedings brought against him to silence him and otherwise deter him from engaging in the exercise of his right to free speech as secured by the First Amendment. The proceedings also violated Petitioner's rights to due process under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Respondent, a Defendant below, is the Oklahoma Bar Association, the agent and official arm of the Supreme Court of Oklahoma, through its general counsel, Dan Murdock.

The Professional Responsibility Tribunal of the Oklahoma Bar Association, through its members, Kenneth L. Delashaw, Jr., Peggy Stockwell, and Neil William McElderry, Jr., was initially named as a defendant. During the pendency of post-judgment proceedings in the district court, the Professional Responsibility Tribunal of the Oklahoma Bar Association was dismissed with prejudice. Pursuant to Sup. Ct. R. 12.6, Petitioner believes that this entity has no interest as a party in the outcome of this Petition.

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OPINIONS AND ORDERS BELOW

On March 1, 2004, the United States District Court for the Western District of Oklahoma entered an order (App. 6-19) abstaining from exercising jurisdiction and dismissing a civil rights action brought by Glenn Beustring. Mr. Beustring, an Oklahoma lawyer, was the subject of state disciplinary proceedings for writing a letter critical of the Oklahoma Supreme Court. On March 15, 2004, Beustring filed a Rule 59(e) motion to vacate the judgment. The district court denied his motion on March 23, 2004 (App. 3-5).

Mr. Beustring filed a Notice of Appeal to the United States Court of Appeals for the Tenth Circuit on March 29, 2004. The Tenth Circuit affirmed the district court in an Order and Judgment entered September 29, 2005, for substantially the reasons and grounds set forth in the district court's opinions. *See Beustring v. Okla. Bar Ass'n*, 143 Fed. Appx. 997 (10th Cir. 2005) (App. 1-2).

Mr. Beustring's subsequent motion for rehearing was denied November 7, 2005 (App. 20-21).

JURISDICTION

This Court has jurisdiction to review on a writ of certiorari the judgment or order in question pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND PROFESSIONAL DISCIPLINARY RULES INVOLVED

Petitioner asserts that he is being prosecuted for exercising his First Amendment right to free speech. According to the Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Petitioner also claims that he is being denied due process and equal protection under Oklahoma law as required by the Fourteenth Amendment to the United States Constitution, Section 1, which provides in relevant part:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The rule barring Petitioner from raising a timely constitutional claim in the proceedings against him is Section 6.4 of the Oklahoma Rules Governing Disciplinary Proceedings, which provides:

The respondent shall within twenty (20) days after the mailing of the complaint file an answer

with the Chief Justice. The respondent may not challenge the complaint by demurrer or motion. In the event the respondent fails to answer, the charges shall be deemed admitted, except that evidence shall be submitted for the purpose of determining the discipline to be imposed.

STATEMENT OF THE CASE

Glenn R. Beustring, a lawyer licensed to practice in Oklahoma, represented the Wilsons in a medical malpractice case filed in the District Court of Tulsa County, Oklahoma (*Wilson I*). The *Wilson* case was tried to a jury, which rendered a verdict in favor of the defendants. Plaintiffs appealed. The Court of Civil Appeals of Oklahoma reversed and remanded the case for new trial because the non-party physician treating the plaintiff made inconsistent statements at trial that the plaintiffs were prevented from rebutting. Plaintiffs had thus been deprived of the opportunity to address the veracity of that physician. On remand (*Wilson II*), Mr. Beustring, as plaintiffs' counsel, attempted to discover information relevant to the treating physician's veracity. Mr. Beustring also learned of, and attempted to discover information regarding, a "unified defense strategy" employed by defense counsel, which entailed structuring a physician's testimony to avoid "cross criticism by defendants" that only works "to the benefit of the plaintiffs." In other words, witness tampering.

Mr. Beustring attempted to obtain discovery relevant to defendants' suborning perjury to fabricate a causation defense and the treating physician's veracity, but was rebuffed by the trial court. Mr. Beustring sought relief by extraordinary writ in the Supreme Court of Oklahoma.

The Supreme Court of Oklahoma granted the plaintiffs limited relief, but, ignoring its precedent, declined to permit discovery on the unified defense/witness tampering issue. Frustrated by the Court's failure to follow its own precedent, an argument presented to the Court a second time in a petition for rehearing, Mr. Beustring wrote a letter to seven Supreme Court Justices. That letter is quoted below verbatim:

Re: *Wilson v. Russell, et al*, No. 98,220 – Denial of Petition for Rehearing

Dear Justices Opala, Hodges, Lavender, Hargrave, Kauger, Boudreau and Winchester:

Please accept this letter as my resignation from the Oklahoma Bar Association effective sixty (60) days from this date so that I can arrange for the orderly transfer of existing clients to new counsel.

As a lawyer, I am statutorily obligated to respect you. Your denial of the Wilson's Petition for Rehearing leaves me without spiritual or physical ability to fulfill my statutory obligation. ***The facts were before you.*** You cannot indulge yourselves in the "three monkeys" game of choosing to ignore the evil. You should be impeached and not honored.

Your decision denying appropriate relief to victims of medical negligence – in this instance, the Wilsons – is an embarrassment to the "Rule of Law" – a repudiation ***of your duty*** to safeguard the rights of the public under the Oklahoma Constitution, Art. 2, §§6, 7 and 19. In the area of medical negligence law, evil lawyers and their "puppet" judges have flourished under your supervision.

Last Sunday, at church, my mother handed me an index card that said only these words: "To sin by silence when they should protest, makes cowards of men."

Sincerely,
Glenn R. Beustring
OBA #768

cc: Chief Justice C.M. Watt
Justice J. Summers

(Emphasis in original.) The letter was based upon Mr. Beustring's reasonable belief of the truth of the statements contained therein.¹

In direct response to this letter, the Oklahoma Bar Association filed a formal complaint on September 30, 2003, against Mr. Beustring for alleged violations of a number of Oklahoma Rules of Professional Conduct.

Petitioner filed a Complaint in the United States District Court for the Western District of Oklahoma on November 5, 2003, seeking declaratory and injunctive relief pursuant to 28 U.S.C. § 1343(a)(3) and (4) (App. 30-53). Specifically, Petitioner requested that the federal court declare that the state bar complaint was filed in bad faith and without probable cause in retaliation for Mr. Beustring exercising his First Amendment rights and to intimidate him and other similarly-situated Oklahoma lawyers from exercising such rights in the future. Mr.

¹ For instance, Mr. Beustring's statement regarding "puppet judges" was premised in part on a fund-raising letter issued by the medical negligence defense bar, in which the trial court judge had been described as providing "unique justice" to medical negligence defendants.

Beustring also sought a permanent injunction against the Oklahoma Bar Association from taking any further action in the disciplinary proceedings and an award of his fees and costs in the matter. Petitioner's claims were brought pursuant to 42 U.S.C. § 1983. Respondent and the Oklahoma Professional Responsibility Tribunal both filed motions to dismiss requesting that the court abstain from exercising jurisdiction pursuant to *Younger v. Harris*, 401 U.S. 37 (1971), and *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982). After an evidentiary hearing, the district court granted the motions to dismiss and abstained from exercising its subject matter jurisdiction. Following the district court's denial of his timely-filed Rule 59(e) motion to vacate, Mr. Beustring lodged an appeal in the United States Court of Appeals for the Tenth Circuit.

Petitioner contended on appeal that the district court erred in determining that his action did not fall within an exception to the *Younger* and *Middlesex* abstention doctrine. Specifically, Petitioner argued that the "exceptional circumstances" exception applied because Oklahoma's attorney disciplinary procedures do not afford an attorney a timely and adequate opportunity to raise a constitutional challenge.

Separately, Petitioner claimed on appeal that the bad faith and harassment exception to the *Younger* abstention doctrine applied and, pursuant to *Dombrowski v. Pfister*, 380 U.S. 479 (1965), Petitioner should not be required to bear the burden of defending himself in the unconstitutional bar disciplinary proceedings.

The decisions of the district court and the court of appeals are generally described in the "Opinions And

Orders Below," supra, at 1. Petitioner now challenges the circuit court's affirmation of the district court's conclusion that Oklahoma's disciplinary procedures provided Petitioner with an adequate and timely opportunity to raise his constitutional claims. In addition, Petitioner contends that he is entitled to invoke the jurisdiction of the federal courts because he is being prosecuted in retaliation for exercising his First Amendment right to the freedom of speech. Thus, the district court's holding that abstention is proper because Petitioner is afforded a timely and adequate right to assert a constitutional challenge upon *de novo* review by the Oklahoma Supreme Court years later, conflicts with *Dombrowski*, wherein the Court held that federal jurisdiction should be exercised when the state proceeding itself is a constitutional deprivation because it is brought in bad faith to discourage conduct protected by the First Amendment. See *Dombrowski*, 380 U.S. at 485-86.

REASONS FOR GRANTING THE WRIT

There are two important issues that warrant granting this petition for a writ of certiorari. These are:

1. The district court's decision, as affirmed by the court of appeals, was based on an erroneous and incomplete application of *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982), wherein the Court addressed the issue of whether the state proceedings provided an adequate opportunity to raise constitutional challenges. Unlike the procedures analyzed in *Middlesex*, the Oklahoma disciplinary procedures do not

afford an attorney a timely judicial resolution of constitutional challenges.

An Oklahoma attorney who exercises the constitutional right to free speech and is subsequently subject to disciplinary proceedings as a result is barred from making an adequate and timely constitutional challenge. Rule 6.4 of the Oklahoma Rules Governing Disciplinary Proceedings provides that an attorney charged with a formal complaint cannot challenge the complaint by demurrer or motion. Further, the Oklahoma Professional Responsibility Tribunal, which serves as the trial panel, is not permitted to consider constitutional issues. *State ex rel. Okla. Bar Ass'n v. Hine*, 1997 OK 52, 937 P.2d 996; *State ex rel. Okla. Bar Ass'n v. Porter*, 1988 OK 114, 766 P.2d 958, 962. constitutional challenges are considered by the Oklahoma Supreme Court only upon a *de novo* review of the proceedings on the merits. *Porter*, 766 P.2d at 962. The ultimate review by the Oklahoma Supreme Court, and thus the initial consideration of an attorney's constitutional challenge, may not occur for years. Such certainly has been the case for Mr. Beustring.

Middlesex was not intended to apply in cases such as this where the state procedure fails to provide a timely opportunity to raise constitutional issues and, consequently, an opportunity for swift judicial resolution of constitutional claims. Thus, certiorari should be granted to clarify the limits of the abstention doctrine as discussed and applied in *Middlesex*.

2. The relevant holding in *Middlesex*, as interpreted by the district court in this case, is inconsistent with *Dombrowski v. Pfister*, 380 U.S. 479 (1965), and the interpretation of *Dombrowski* in Justice Brennan's opinion

in *Perez v. Ledesma*, 401 U.S. 82 (1971). *Dombrowski* and *Perez* emphasize the established principle that the federal courts are the primary guardian of constitutional rights. This guardianship is necessary to prevent a person from being subjected to the burden of defending himself against a proceeding that is itself unconstitutional. Proceedings where a party is unable to raise a constitutional defense and must wait for years to have the constitutional claim heard by a judicial body are proceedings that fail to adequately protect the important constitutional rights at stake. Thus, an aggrieved party is permitted to bring a civil claim in federal court for relief. *Dombrowski*, 380 U.S. at 486; *Perez*, 401 U.S. at 118. Accordingly, the district court's interpretation of *Middlesex* is in direct conflict with *Dombrowski*. The Court should accept certiorari to harmonize its holdings. See *Harlow v. Fitzgerald*, 457 U.S. 800, 822 n.2 (1982) (Burger, C.J., dissenting) (noting that the Supreme Court has "an obligation to try to harmonize its holdings").

I. Lack of a Swift Resolution of Constitutional Challenges

The lower courts found that Oklahoma's attorney disciplinary procedures provided Petitioner with an adequate opportunity to raise his jurisdictional claims or challenges. In reaching this conclusion, the lower courts relied on *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982). Specifically, the district court focused on footnote 15, in which the Court stated that, even if the New Jersey Supreme Court had not altered its rules to permit an interlocutory constitutional challenge, the attorney had an adequate opportunity to raise constitutional issues upon an ultimate review of the

decision of the disciplinary review board by the New Jersey Supreme Court.

The treatment of Mr. Beustring by the Oklahoma Supreme Court is the antitheses of the treatment afforded in *Middlesex*:

Indeed, the decision of the New Jersey Supreme Court to consider respondent Hinds' constitutional challenges indicates that the state court desired to give Hinds a swift judicial resolution of his constitutional claims.

Middlesex, at fn. 16.

The lower court's reasoning is premised solely on the provisions in the preceding footnote, note 15. The district court's order dismissing the case provides:

Having carefully reviewed the parties' submissions, and the applicable law, the Court finds that Beustring has failed to establish that he will be deprived of an adequate opportunity to raise his constitutional claims in the bar disciplinary proceeding. While Rule 6.4 of the Rules Governing Disciplinary Proceedings provides that a respondent lawyer may not challenge a disciplinary complaint by demurrer or motion, the Court finds that this rule does not preclude a respondent lawyer from raising constitutional issues in his answer or addressing and presenting evidence on such issues during the proceedings before the PRT. Further, the Court finds that while the PRT can not ultimately determine the merits of any constitutional challenge, the PRT can forward its concerns and make recommendations to the Oklahoma Supreme Court, which, upon *de novo* review, does consider and ultimately determine the merits of any constitutional challenge. The

Court finds that Oklahoma's bar disciplinary procedures provide Beustring with an adequate opportunity to raise his constitutional claims. *See Middlesex*, 457 U.S. at 436 n.15 (noting that individual has adequate opportunity to raise constitutional claims even if state supreme court does not grant interlocutory review of constitutional issues but only addresses those issues upon its ultimate review of decision of disciplinary review board).

The district court erroneously determined that Oklahoma's attorney disciplinary proceedings afforded an adequate opportunity to raise constitutional challenges based on the provisions in footnote 15 in *Middlesex*, without considering the provisions of the following footnote, in which it was noted that the State had indicated a desire to give the attorney a "swift resolution of his constitutional claims." No swift resolution of constitutional claims exists in Oklahoma's disciplinary proceedings.

The Oklahoma proceedings do not afford an attorney subject to discipline a timely or swift resolution of constitutional issues, as contemplated by *Middlesex*. The disciplinary complaint against Mr. Beustring was filed September 30, 2003. The Oklahoma Supreme Court Docket² (App. 22-29) shows that, after completion of the proceedings before the Professional Responsibility Tribunal and the submission of a report by that entity, the parties submitted their briefs to the Oklahoma Supreme Court. The briefing was completed September 24, 2004 (App. 27). The case was thereafter assigned to the Oklahoma Supreme Court on November 10, 2004 (App. 28). The proceedings, and the

² Available at www.oscn.net, Appellate Docket No. SCBD-4849.

resolution of Mr. Beustring's First Amendment challenge, remain pending before the Oklahoma Supreme Court, more than one year after the proceedings were submitted to that Court for *de novo* review and consideration and more than two years (28 months as of 2-1-06) since the original disciplinary charges were filed.

This extreme delay is even longer than the time required by former State Senator E. Melvin Porter to obtain a vindication of his First Amendment right to freedom of speech almost twenty (20) years ago. *See State ex rel. Okla. Bar Ass'n v. Porter*, 1988 OK 114, 766 P.2d 958. The conduct that subjected Mr. Porter to the bar disciplinary proceedings was his criticism of a federal trial judge, which occurred at the completion of a criminal trial in federal court in Oklahoma City, Oklahoma, some time between March and August 1986.³ The Oklahoma Supreme Court reviewed the trial panel's decision and Mr. Porter's constitutional claim and issued a decision vindicating Mr. Porter on October 18, 1988. *Porter*, 1988 OK 114, ¶32, 766 P.2d at 969.

In contrast, it has been more than three years since Mr. Beustring criticized members of the Oklahoma Supreme Court on January 7, 2003. Surely this extreme delay cannot be characterized as a swift judicial resolution

³ The decision on appeal from that criminal trial, *United States v. McIntyre*, 836 F.2d 467 (10th Cir. 1987), shows that the charges against McIntyre resulted from an event occurring March 24, 1986. The exact date the McIntyre trial concluded, when Senator Porter made the remarks criticizing the federal trial judge, is not discussed in the federal court opinion. The *McIntyre* appeal, No. 86-2212, was filed August 15, 1986. Accordingly, the statements must have been made sometime between March 24 and August 15, 1986.

of such important constitutional rights. On this basis, the Court should grant certiorari.

II. Conflicts Exist Between *Middlesex* and *Dombrowski* on the Federal Courts' Role in Protecting Constitutional Rights

The lower courts' interpretation of *Middlesex* is inconsistent with *Dombrowski v. Pfister*, 380 U.S. 479 (1965), as expanded upon in Justice Brennan's opinion in *Perez v. Ledesma*, 401 U.S. 82 (1971). In *Dombrowski*, 380 U.S. at 485-86, the Court provided that jurisdiction should be exercised when:

the allegations [of the] complaint depict a situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights [and] [t]hey suggest that a substantial loss or impairment of freedoms of expression will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination. These allegations, if true, clearly show irreparable injury.

Justice Brennan considered this language in his separate opinion in *Perez v. Ledesma*, 401 U.S. at 116-18:

Dombrowski . . . recognized that exceptional circumstances may justify federal intervention when the opportunity to raise constitutional defenses at the state criminal trial does not assure protection of the constitutional rights at stake. *Dombrowski* considered two situations in which 'exceptional circumstances' can exist. First, if in order to discourage conduct protected by the First Amendment or by some other provision of

the Constitution, a State brings or threatens to bring a criminal prosecution in bad faith for the purpose of harassment, the bringing of the prosecution or the threat is itself a constitutional deprivation since it subjects a person to a burden of criminal defense which he should not have to bear, and there then exists a situation 'in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights. Accordingly, in this context a civil suit is an appropriate means to cut short the unconstitutional state prosecution. The civil suit for remedial relief may appropriately be brought in federal court since the federal courts are the primary guardians of constitutional rights . . . Thus in *Dombrowski* we held that in cases in these categories federal courts may properly intervene in order to assure the full protection of federal constitutional right.

(Citations and footnotes omitted.)

Dombrowski and *Perez* affirm the principle that the federal courts are the primary guardian of constitutional rights and will protect a person seeking remedial relief from an unconstitutional state prosecution. The person subject to the punitive state proceedings is not required to endure protracted litigation before having an opportunity to have his constitutional claims heard. *Dombrowski*, 380 U.S. at 487. An immediate resolution of such claims is necessary to protect against the constitutional deprivation inherent in the state proceeding itself. *Id.* at 489 (interest in immediate resolution and final adjudication of the constitutional claims); *Perez*, 401 U.S. at 118.

Yet an ongoing constitutional deprivation is exactly what is happening in this case. Mr. Beustring has been

forced to shoulder the burden of defending himself in disciplinary proceedings when he should not have to do so. This injury, coupled with the lack of an opportunity to seek timely consideration of his constitutional claims in the state proceedings, results in the complete denial of a forum in which Beustring may seek complete relief for the State's infringement of his constitutional right to free expression. If the lower court's interpretation is left uncorrected, the result is the implicit overruling of *Dombrowski*. Clearly, this is an undesirable result. Mr. Beustring and others similarly-situated should have the opportunity to seek relief in federal court for constitutional deprivations committed by the State.

III. Petition for Certiorari Standards

Both of these issues qualify for review on certiorari pursuant to United States Supreme Court Rule 10, which provides in part:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

* * - *

(c) a state court or a United States court of appeals has decided an *important question of federal law that has not been, but should be settled by this Court*, or has decided an *important federal question in a way that conflicts with relevant decisions of this Court*. [Emphasis supplied.]

CONCLUSION

Middlesex did not contemplate the situation where consideration by the State's Supreme Court of a lawyer's constitutional defense in a disciplinary proceeding would not occur for years, after protracted litigation and extreme delays. The Court should grant certiorari to determine whether it is appropriate to extend *Middlesex* to such circumstances.

Further, *Middlesex*, as interpreted by the lower courts to apply to these circumstances, is in direct conflict with this Court's jurisprudence in *Dombrowski* and *Perez*.

Respectfully submitted,

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143 Fed. Appx. 997

APPENDIX A
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

GLENN R. BEUSTRING,

Plaintiff-Appellant,

v.

**THE OKLAHOMA BAR
ASSOCIATION, the agent
and an official arm of the
Supreme Court of Oklahoma,
through its General Counsel,
Dan Murdock,**

Defendant-Appellee.

No. 04-6091

W.D. Oklahoma

(D.C. No. CIV-03-1538-M)

ORDER AND JUDGMENT*

(Filed September 29, 2005)

Before **HARTZ, ANDERSON, and TYMKOVICH**, Circuit
Judges.

Attorney Glenn R. Beustring brought this 42 U.S.C.
§ 1983 action against the Oklahoma Bar Association and

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

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certain individuals, challenging disciplinary proceedings brought against him by the Bar. Counsel for the parties agreed at oral argument that the disciplinary proceedings are still ongoing, having been presented to and remaining pending before the Oklahoma Supreme Court.

The details of this case, including Mr. Beustring's arguments and the underlying facts and procedural history, are set forth in detail in two orders entered by the district court, dated, respectively, March 1, 2004, and March 23, 2004, and we need not repeat them here. In those orders, the district court concluded that "it should abstain from exercising jurisdiction over the case at bar under the *Younger/Middlesex* abstention doctrine."¹ Accordingly, the court dismissed the action on that basis. Likewise, the district court denied the plaintiff/appellant's Fed. R. Civ. P. 59(e) motion to vacate the judgment, citing the same grounds set forth in the court's initial opinion.

We have reviewed Mr. Beustring's arguments on appeal claiming that the district court erred in its judgment, and we are unpersuaded. Substantially for the reasons and on the grounds set forth in the district court's opinions referred to above, the judgment of the district court is AFFIRMED.

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge

¹ *Younger v. Harris*, 401 U.S. 37 (1971); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982).

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA**

GLENN R. BEUSTRING,)
individually and as an attorney)
admitted to practice law in the)
State of Oklahoma and a member)
of the Oklahoma Bar Association,)
Plaintiff,)
vs.)
OKLAHOMA BAR ASSOCIATION,)
the agent and an official arm of)
the Supreme Court of Oklahoma)
through its General Counsel, Dan)
Murdock; and PROFESSIONAL)
RESPONSIBILITY TRIBUNAL,)
through its members, Kenneth L.)
Delashaw, Jr., Peggy Stockwell)
and Neil William McElderry, Jr.,)
Defendants.)

Case No.
CIV-03-1538-M

ORDER

Before the Court is plaintiff's Rule 59(e) Motion to Vacate Judgment Entered on Judgment Docket March 1, 2004 and Underlying Order, filed March 15, 2004.

Grounds warranting a motion under Federal Rule of Civil Procedure 59(e) include "(1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct error or prevent manifest injustice." *Servants of the Paraclete v. John Does I-XVI*, 204 F.3d 1005, 1012 (10th Cir. 2000). A Rule 59(e) motion is appropriate "where the court has misapprehended the

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facts, a party's position, or the controlling law" but is not appropriate "to revisit issues already addressed or advance arguments that could have been raised in prior briefing." *Id.*

In his motion and brief, plaintiff asserts that the Court committed "manifest errors of fact and law" when it found that this action does not fall within the bad faith/harassment exception to the *Younger* abstention doctrine. Plaintiff also asserts that he was not afforded an opportunity to offer evidence on the issues of the alleged bias and prejudice of the Oklahoma Supreme Court and the Oklahoma Bar Association's alleged violation of his Fourteenth Amendment rights to "due process" and "equal protection."

Having carefully reviewed plaintiff's motion and brief, the Court finds no grounds which would warrant vacating the Court's March 1, 2004 Order and Judgment. Specifically, the Court finds that it did not commit "manifest errors of fact and law" in making its determination. The Court also finds that it did not misapprehend the facts, the parties' positions, or the controlling law. The Court further finds that the issues of the alleged bias and prejudice of the Oklahoma Supreme Court and the Oklahoma Bar Association's alleged violation of plaintiff's Fourteenth Amendment rights to "due process" "equal protection" were raised in defendants' motions to dismiss and that plaintiff was afforded an opportunity to offer evidence on these issues in both his responses, at the hearing, and in his supplemental pleadings.

Additionally, the Court finds that in his motion, plaintiff merely reargues issues that were already addressed by the Court in its March 1, 2004 Order and

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Judgment and advances arguments that could have been raised when the prior motions were briefed, at the hearing, and/or through the supplemental pleadings which the Court allowed plaintiff to file. Plaintiff simply disagrees with the Court's conclusion and seeks to reargue its position in the hope that the Court changes its mind.

Therefore, for the above reasons, the Court DENIES plaintiff's Rule 59(e) Motion to Vacate Judgment Entered on Judgment Docket on March 1, 2004 and Underlying Order [docket no. 33].

**IT IS SO ORDERED this 23rd day of March,
2004.**

/s/ Vicki Miles-LaGrange
VICKI MILES-LAGRANGE
UNITED STATES
DISTRICT JUDGE

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA**

GLENN R. BEUSTRING,)
individually and as an attorney)
admitted to practice law in the)
State of Oklahoma and a member)
of the Oklahoma Bar Association,)
Plaintiff,)
vs.)
OKLAHOMA BAR ASSOCIATION,) Case No.
the agent and an official arm of) CIV-03-1538-M
the Supreme Court of Oklahoma)
through its General Counsel, Dan)
Murdock; and PROFESSIONAL)
RESPONSIBILITY TRIBUNAL,)
through its members, Kenneth L.)
Delashaw, Jr., Peggy Stockwell)
and Neil William McElderry, Jr.,)
Defendants.)

ORDER

On December 29, 2003, defendants filed motions to dismiss. On January 15, 2004, plaintiff filed his responses. On February 11, 2004, the Court conducted a hearing on the issue of whether the instant action falls within an exception to the *Younger*¹/*Middlesex*² abstention doctrine. On February 26, 2004, plaintiff filed his supplemental

¹ *Younger v. Harris*, 401 U.S. 37 (1971).

² *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982).

evidence, and the parties filed proposed findings of fact and conclusions of law. Based upon the parties' submissions, and the evidence presented, the Court makes its determination.

I. Introduction

Plaintiff Glenn R. Beustring ("Beustring") is a lawyer who is currently licensed to practice law in the state of Oklahoma. Beustring represented the plaintiffs in the case of *Wilson, et al. v. Russell, et al.* in the District Court of Tulsa County. On November 5, 1997, Beustring filed a Motion to Withdraw in that case because the plaintiffs could not "receive a fair trial based on pretrial ruling made by the Court." This pretrial ruling involved the number of expert witnesses who could testify for each side – in effect allowing plaintiffs to have one expert and defendants to have six or seven experts. On November 18, 1997, Judge David L. Peterson, the assigned judge, issued an order allowing Beustring to withdraw and staying the case for up to sixty days for new counsel to make an entry of appearance. At the request of his clients, on February 17, 1998, Beustring reentered his appearance in the case. The matter was subsequently tried to a jury which entered a verdict for the defendants. Beustring filed a motion for a new trial, which the trial court denied. Beustring appealed that order to the Oklahoma Supreme Court

The appeal was assigned to the Oklahoma Court of Civil Appeals, which reversed the decision and remanded the matter back to the district court. Upon remand, Judge Peterson recused, and the case was assigned to Judge

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Deborah C. Shallcross.³ The matter was set for trial on January 13, 2003. Beustring objected to the trial setting and repeatedly sought to have the trial continued.⁴ Contemporaneous with his efforts in the trial court, Beustring also sought a continuance of the trial setting from the Oklahoma Supreme Court; on December 31, 2002, Beustring filed an application to strike the trial setting and to stay all district court proceedings in the case.

Additionally, on September 6, 2002, Beustring filed an Application to Assume Original Jurisdiction and Petition for Writ of Mandamus with the Oklahoma Supreme Court. Beustring sought to invoke the Oklahoma Supreme Court's original jurisdiction in an effort to disqualify Judge Shallcross and to secure appellate review of certain legal issues before being required to retry the case. On November 12, 2002, the Oklahoma Supreme Court issued a Writ of Mandamus commanding Judge Shallcross to vacate a portion of her order which concerned discovery but denying all other requests for relief. On December 2, 2002, Beustring filed a Petition for Rehearing regarding the November 12, 2002 Order.⁵ On January 7, 2003, the

³ Beustring requested Judge Shallcross disqualify herself and recuse from the case. Judge Shallcross denied Beustring's request. Beustring further sought Judge Shallcross' disqualification from the Chief Administrative Judge of Tulsa County, who also denied Beustring's request.

⁴ On December 16, 2002, Beustring filed with the trial court an emergency application to strike the trial scheduled for January 13, 2003. On December 26, 2002, Beustring filed with the trial court a second motion to strike trial, and on January 3, 2003, Beustring filed with the trial court a third motion to strike trial.

⁵ One of the issues raised in the mandamus action and the petition for rehearing was the trial court's refusal to allow discovery of "witness tampering" by lawyers retained by the Physicians Liability Insurance

(Continued on following page)

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Oklahoma Supreme Court entered an order denying the Petition for Rehearing.

On the afternoon of January 7, 2003, Beustring hand-delivered a letter addressed to the Oklahoma Supreme Court. That letter provided:

Please accept this letter as my resignation from the Oklahoma Bar Association effective sixty (60) days from this date so that I can arrange for the orderly transfer of existing clients to new counsel.

As a lawyer, I am statutorily obligated to respect you. Your denial of the Wilson's Petition for Rehearing leaves me without spiritual or physical ability to fulfill my statutory obligation. ***The facts were before you.*** You cannot indulge yourselves in the "three monkeys" game of choosing to ignore the evil. You should be impeached and not honored.

Your decision denying appropriate relief to victims of medical negligence – in this instance, the Wilsons – is an embarrassment to the "Rule of Law" – a repudiation of ***your duty*** to safeguard the rights of the public under the Oklahoma Constitution, Art. 2, §§ 6, 7 and 19. In the area of medical negligence law, evil lawyers and their "puppet" judges have flourished under your supervision.

Last Sunday, at church, my mother handed me an index card that said only these words: "To

Company of Oklahoma ("PLICO") and its sealing of documentary evidence of "witness tampering" by members of the medical defense bar without the required evidentiary showing.

sin by silence when they should protest, makes cowards of men."

Plaintiff's hearing exhibit 1 (emphasis in original).

On January 8, 2003, Beustring appeared before a referee of the Oklahoma Supreme Court at a hearing on his application for an emergency stay of the trial setting. At that time, Beustring advised the Referee and opposing counsel that he had tendered a letter resigning from the practice of law. That afternoon, the Oklahoma Supreme Court granted an emergency stay of the trial based upon Beustring's filing of an application to withdraw as attorney in the case and his letter sent to the Oklahoma Supreme Court withdrawing from the practice of law.

On January 22, 2003, Beustring hand-delivered to the Oklahoma Supreme Court a request to withdraw his resignation. According to Beustring, the letter was tendered after he received a call from General Counsel, Dan Murdock, advising him that the "conditional" resignation was ineffectual due to the fact that it attempts to reserve sixty (60) days in order to transfer clients to other counsel and, therefore, could not be accepted. Beustring also asserts that Mr. Murdock stated that he would like to come to Tulsa to talk Beustring out of resignation from the Bar because "we need lawyers like you." Mr. Murdock, however, never came to Tulsa.

On February 28, 2003, after being unable to find substitute counsel, Beustring filed an entry of appearance in the *Wilson* case. Beustring served as counsel for the plaintiffs in that action which proceeded to trial on July 7, 2003. On or about July 30, 2003, Beustring filed an original action with the Oklahoma Supreme Court requesting that court to vacate its decision in the mandamus action

for "fraud on the court." On September 15, 2003, the Oklahoma Supreme Court dismissed the "fraud on the court" action.

On September 30, 2003, defendant Oklahoma Bar Association ("OBA") filed a bar complaint against Beustring. The Complaint alleges that Beustring's resignation was a subterfuge designed to secure a continuance of the trial setting and that Beustring thereby effected a continuance which the trial court had denied him. Bar Complaint at ¶ 31. The Complaint asserts that this conduct violated Rules 3.5(d),⁶ 8.4(c),⁷ and 8.4(d)⁸ and constitutes grounds for professional discipline. Bar Complaint at ¶ 32. Further, the Complaint alleges:

[Beustring's] conduct thereby (specifically his comments that the Supreme Court was engaged in a game of "three monkeys," that the Supreme Court was "choosing to ignore the evil," that the Supreme Court should be "impeached and not honored," and that "'puppet' judges have flourished" under the supervision of the Supreme Court) violated Rule 8.2(a), ORPC,⁹ and Rule 1.3,

⁶ Rule 3.5(d) provides, in pertinent part: "[a] lawyer shall not . . . engage in conduct intended to disrupt a tribunal." Rule 3.5(d), Oklahoma Rules of Professional Conduct, Okla. Stat. tit. 5, Ch. 1, App. 3-A.

⁷ Rule 8.4(c) provides, in pertinent part: "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation. . ." Rule 8.4(c), Oklahoma Rules of Professional Conduct, Okla. Stat. tit. 5, Ch. 1, App. 3-A.

⁸ Rule 8.4(d) provides, in pertinent part: "[i]t is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice. . ." Rule 8.4(d), Oklahoma Rules of Professional Conduct, Okla. Stat. tit. 5, Ch. 1, App. 3-A.

⁹ Rule 8.2(a) provides, in pertinent part: "[a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as

(Continued on following page)

RGDP,¹⁰ and constitutes grounds for professional discipline.

Bar Complaint at ¶ 33.

On November 5, 2003, Beustring filed the instant action against the OBA and the Professional Responsibility Tribunal ("PRT"). In his Complaint, Beustring seeks (1) a declaratory judgment that the disciplinary proceedings against him were brought in "bad faith" and without "probable cause" under color of state law and subjected or caused him to be subjected to the deprivation of rights secured by the First Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution; (2) a permanent injunction enjoining the OBA, the General Counsel and other members of his staff, and the PRT from taking any further action in the disciplinary action, including the PRT's submission of a report or recommendation to the Oklahoma Supreme Court; and (3) an award of his fees and costs in this action pursuant to 42 U.S.C. § 1988.

In his Complaint, Beustring alleges that the charges asserted against him in the OBA Complaint are based on "information and belief," not evidence, much less clear and convincing evidence – the standard applicable in disciplinary

to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office." Rule 8.2(a), Oklahoma Rules of Professional Conduct, Okla. Stat. tit. 5, Ch. 1, App. 3-A.

¹⁰ Rule 1.3 provides, in pertinent part: "[t]he commission by any lawyer of any act contrary to prescribed standards of conduct, whether in the course of his professional capacity, or otherwise, which act would reasonably be found to bring discredit upon the legal profession, shall be grounds for disciplinary action. . ." Rule 1.3, Oklahoma Rules Governing Disciplinary Proceedings, Okla. Stat. tit. 5, Ch. 1, App. 1-A.

proceedings. Beustring asserts that the statements contained in his letter to the Supreme Court Justices constitute speech on vital issues of self-government protected by the First Amendment and that his exercise of protected rights under the First Amendment was a substantial or motivating factor in the filing of the OBA Complaint. Beustring also alleges that the OBA knew or should have known of controlling Oklahoma Supreme Court precedent and that without proof that the statements Beustring made were false, the Professional Responsibility Commission was foreclosed from prosecuting him under the First Amendment.

Additionally, Beustring alleges that the OBA Complaint was filed in "bad faith" and without "probable cause" for constitutionally impermissible reasons – the suppression of protected speech and retaliation against him for exercising his First Amendment right to criticize the Oklahoma Supreme Court's summary denial of the petition for rehearing filed in the mandamus action. Finally, Beustring asserts that the filing of the OBA Complaint and scheduled prosecution of him has had and will continue to have a significant chilling effect on speech that cannot be avoided by proceedings before the PRT and the Oklahoma Supreme Court.

II. Discussion

Defendants have now filed motions to dismiss, asserting that this Court should abstain from exercising jurisdiction in this matter based upon *Younger* and *Middlesex*. "Under the *Younger* abstention doctrine, federal courts should not interfere with state court proceedings by granting equitable relief – such as injunctions of important state

proceedings or declaratory judgments regarding constitutional issues in those proceedings – when a state forum provides an adequate avenue for relief.” *Weitzel v. Div. of Occupational and Prof'l Licensing of the Dep't. of Commerce of the State of Utah*, 240 F.3d 871, 875 (10th Cir. 2001) (internal quotations and citation omitted). In *Middlesex*, the United States Supreme Court extended the *Younger* abstention doctrine to state bar disciplinary proceedings. *Middlesex*, 457 U.S. at 431-37.

A. Applicability of *Younger* Abstention Doctrine

Under the *Younger* abstention doctrine, a federal court must abstain from exercising jurisdiction when: (1) there is an ongoing state judicial proceeding; (2) the state proceedings implicate important state interests, and (3) there is an adequate opportunity in the state proceedings to hear the claims raised in the federal complaint. *Weitzel*, 240 F.3d at 875. “*Younger* abstention is non-discretionary; the district court must abstain once the conditions are met, absent extraordinary circumstances.” *Id.* In the case at bar, the parties do not dispute that the first two conditions are met – that the bar disciplinary proceeding against Beustring is an ongoing state judicial proceeding and that it implicates important state interests. The Supreme Court’s holding in *Middlesex* further supports a finding that the first two conditions are met.

The parties do, however, dispute whether the third condition – whether there is an adequate opportunity in the bar disciplinary proceeding to raise Beustring’s constitutional challenges – is met. Beustring asserts that there is no timely or adequate procedure available to him to raise constitutional issues in the course of the disciplinary

proceedings. Specifically, Beustring asserts that under the Oklahoma Rules Governing Disciplinary Proceedings, he does not have a right to have the constitutional issues considered before or during a trial before the PRT and that the constitutional issues can only be considered in the subsequent *de novo* review by the Oklahoma Supreme Court. Beustring further asserts that the Oklahoma Supreme Court is presumptively not a fair and impartial tribunal because the letter at issue was written to justices of the Supreme Court.

It is the plaintiff's burden to establish that the state procedures are inadequate. *Butler v. Ala. Judicial Inquiry Comm'n*, 245 F.3d 1257, 1262 (11th Cir. 2001). "Minimal respect for the state processes, of course, precludes any *presumption* that the state courts will not safeguard federal constitutional rights." *Id.* (internal quotations and citations omitted) (emphasis in original).

Having carefully reviewed the parties' submissions, and the applicable law, the Court finds that Beustring has failed to establish that he will be deprived of an adequate opportunity to raise his constitutional claims in the bar disciplinary proceeding. While Rule 6.4 of the Rules Governing Disciplinary Proceedings provides that a respondent lawyer may not challenge a disciplinary complaint by demurrer or motion, the Court finds that this rule does not preclude a respondent lawyer from raising constitutional issues in his answer or addressing and presenting evidence on such issues during the proceedings before the PRT. Further, the Court finds that while the PRT can not ultimately determine the merits of any constitutional challenge, the PRT can forward its concerns and make recommendations to the Oklahoma Supreme Court, which, upon *de novo* review, does consider and

ultimately determine the merits of any constitutional challenge. The Court finds that Oklahoma's bar disciplinary procedures provide Beustring with an adequate opportunity to raise his constitutional claims. *See Middlesex*, 457 U.S. at 436 n.15 (noting that individual has adequate opportunity to raise constitutional claims even if state supreme court does not grant interlocutory review of constitutional issues but only addresses those issues upon its ultimate review of decision of disciplinary review board).

Further, if state law requires the recusal of judges under proper circumstances and provides a mechanism to replace such judges, the adequacy of an individual's opportunity to present constitutional claims is not altered based upon allegedly biased judges. *Kugler v. Helfant*, 421 U.S. 117, 127-29 (1975); *Flangas v. State Bar of Nev.*, 655 F.2d 946, 950 (9th Cir. 1981). In Oklahoma, a judge or justice must disqualify himself if he has a personal interest or bias concerning a party or has knowledge of an evidentiary fact. Canon 3(E), Oklahoma Code of Judicial Conduct, Okla. Stat. tit. 5, Ch. 1, App. 4. In the event of a disqualification of a Supreme Court Justice, the Governor of Oklahoma is required to appoint a member of the bar with similar qualifications to sit in his or her place. Okla. Stat. tit. 20, § 1402. Accordingly, the Court finds that the allegation that Beustring can not receive a fair hearing before the Oklahoma Supreme Court because six members of that court received the letter at issue and because the letter was highly critical of that court does not alter this Court's conclusion that Beustring has an adequate opportunity to present his constitutional claims in the bar disciplinary proceeding.

B. Applicability of Exception to Younger Abstention Doctrine

The *Younger* abstention doctrine is inapplicable in cases (1) commenced in bad faith or to harass, (2) based on a flagrantly and patently unconstitutional statute, or (3) related to any other extraordinary circumstance creating a threat of "irreparable injury" both great and immediate. *Phelps v. Hamilton*, 59 F.3d 1058, 1064 (10th Cir. 1995).

In considering whether a federal plaintiff meets one of the exceptions to *Younger* abstention, federal courts must balance the necessity of protecting an individual's exercise of his or her constitutional rights with a prosecutor's discretion in selecting certain actions for [] prosecution. Moreover, federalism concerns counsel against federal court intervention into state prosecutions so that the state judiciary opportunity will have the opportunity to correct any prosecutorial violations of an individual's constitutional rights. These twin rationales of respecting prosecutorial discretion and federalism explain why the exceptions to *Younger* only provide for a very narrow gate for federal intervention.

Id. (internal quotations and citation omitted).

Beustring asserts that this action falls within an exception to the *Younger* abstention doctrine because the disciplinary proceedings against him were commenced in bad faith, for harassment, to punish him for exercising his First Amendment right to criticize the Oklahoma Supreme Court, and to deter him from exercising such right in the future. The Tenth Circuit considers three factors in determining whether a state action was commenced in bad faith or was intended to harass:

(1) whether it was frivolous or undertaken with no reasonably objective hope of success; (2) whether it was motivated by defendant's suspect class or in retaliation for the defendant's exercise of constitutional rights; and (3) whether it was conducted in such a way as to constitute harassment and an abuse of prosecutorial discretion, typically through the unjustified and oppressive use of multiple prosecutions.

Weitzel, 240 F.3d at 877 (internal quotations and citation omitted). "Ordinarily, a bad faith prosecution will not be predicated upon probable cause. However, if prosecutions are brought for the purpose of chilling or preventing a defendant from exercising his or her constitutional rights, this may constitute a harassing and/or bad faith prosecution, even though the charges are predicated on probable cause." *Phelps*, 59 F.3d at 1064-65 n.12. A plaintiff has a heavy burden of proof in order to overcome the bar of *Younger* abstention – a plaintiff must set forth more than mere allegations of bad faith or harassment; he must prove bad faith or harassment before intervention is warranted. *Weitzel*, 240 F.3d at 877; *Phelps*, 59 F.3d at 1066.

Having reviewed the parties' submissions and the evidence presented, the Court finds that Beustring has not presented sufficient evidence to satisfy his heavy burden of proving that the disciplinary proceeding was brought in bad faith or to harass. Specifically, the Court finds that Beustring has not presented sufficient evidence that the OBA Complaint is frivolous or that the disciplinary proceeding was undertaken with no reasonably objective hope of success. Beustring, in fact, has offered nothing more than his own conclusory assertions of bad faith and harassment. Further, evidence has been presented that the OBA investigated the bar complaint made against

Beustring, researched the constitutional issues and determined that the First Amendment was not implicated, and is prepared to present witnesses and documentary evidence to support the complaint. The Court also finds that Beustring has presented no evidence that the bar disciplinary proceeding was commenced to punish him for exercising his First Amendment right to criticize the Oklahoma Supreme Court and to deter him from exercising such right in the future. Accordingly, the Court finds that the instant action does not fall within the bad faith/harassment exception to the *Younger* abstention doctrine.¹¹

III. Conclusion

For the reasons set forth above, the Court finds that it should abstain from exercising jurisdiction over the case at bar under the *Younger/Middlesex* abstention doctrine. Accordingly, the Court GRANTS the PRT's Motion to Dismiss [docket no. 10], GRANTS the OBA's Motion to Dismiss [docket no. 12], and DISMISSES this action.

IT IS SO ORDERED this 1st day of March, 2004.

/s/ Vicki Miles-LaGrange
VICKI MILES-LAGRANGE
UNITED STATES
DISTRICT JUDGE

ENTERED ON JUDGMENT DOCKET ON 3/1/04

¹¹ Beustring does not assert, and the Court does not find, that any other exception to the *Younger* abstention doctrine is applicable.

APPENDIX D
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

GLENN R. BEUSTRING,

Plaintiff-Appellant,

v.

No. 04-6091

THE OKLAHOMA BAR
ASSOCIATION, the agent and
an official arm of the Supreme
Court of Oklahoma, through it's
General Counsel, Dan Murdock,

Defendant-Appellee.

ORDER

Filed November 7, 2005

Before **HARTZ**, **ANDERSON**, and **TYMKOVICH**, Circuit
Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to
all of the judges of the court who are in regular active
service. As no member of the panel and no judge in regular

active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
CLERK, COURT OF APPEALS

by: /s/ [Illegible]
Deputy Clerk

APPENDIX E

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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

OKLAHOMA BAR ASSOCIATION, Complainant, v. Glenn R. Beustring, Respondent.	No. SCBD-4849 (Disciplinary Rule 6) Filed: 11/07/2003
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Parties

Beustring, Glenn R., Respondent
OKLAHOMA BAR ASSOCIATION, Complainant

Attorneys

Attorney	Represented Parties
Abowitz, Murray E(Bar # 117) Abowitz Rhodes Dahnke, PC P O BOX 1937 Oklahoma City, OK 73101	Beustring, Glenn R.

Lower Court Counts and Other Information

Count	Case Number	Statute	Crime	Special Sentence	Judge	Reporter
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0-1590

Docket

Line Date	Code	Entry Date
11/07/2003	CPLT	Nov 7 2003 12:55:11:533PM
		Complaint
11/07/2003	TEXT	Nov 7 2003 12:57:15:720PM
		ENTRY OF APPEARANCE - MURRY [sic] A. ABOWITZ
11/07/2003	TEXT	Nov 7 2003 12:58:20:920PM
		RESPONDENT'S MOTION TO ENLARGE TIME FOR ANSWER- ING COMPLAINT TO NOVEMBER 10, 2003 AND CONTINUANCE OF TRIAL SETTING
11/07/2003	TEXT	Nov 7 2003 1:00:30:700PM
		JE: ORDER - WATT, CJ; THE RESPONDENT GLENN R. BEUS- TRING BY HIS COUNSEL IS GRANTED TO NOVEMBER 6, 2003 TO FILE HIS ANSWER TO THE COMPLAINT FILED HEREIN.

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11/07/2003	TEXT	Nov 7 2003 1:00:50:527PM <u>RESPONDENT'S ANSWER</u>
11/07/2003	TEXT	Nov 7 2003 1:01:11:540PM <u>RESPONDENT'S MOTION TO DISMISS COMPLAINT</u>
11/07/2003	TEXT	Nov 7 2003 1:02:18:620PM <u>APPELLANT'S MOTION TO STAY</u>
11/07/2003		Nov 7 2003 12:48:44:790PM <u>Disciplinary Rule 6 Initial Filing</u>
11/07/2003	PAY	Nov 7 2003 12:49:28:367PM Receipt # 20945 on 11/07/2003. OKLAHOMA BAR ASSOCIATION V. GLENN R. BEUSTRING Payor: ALLEN J WELCH Total Amount Paid: \$ 0.00. Line Items: \$0.00 on <u>Disciplinary Rule 6 Initial Filing.</u>
11/13/2003	TEXT	Nov 13 2003 2:24:43:150PM <u>COMPLAINT'S RESPONSE TO MOTION TO STAY</u>
11/13/2003	TEXT	Nov 13 2003 2:25:08:100PM <u>COMPLAINANT'S RESPONSE TO MOTION TO DISMISS</u>
11/24/2003	TEXT	Nov 24 2003 2:18:09:587PM <u>SCHEDULING ORDER</u>
12/10/2003	TEXT	Dec 10 2003 2:58:13:463PM <u>REQUEST FOR AN EXTENSION OF TIME</u>
12/15/2003	TEXT	Dec 15 2003 2:33:32:993PM <u>ORDER ALLOWING EXTENSION OF TIME /S/ KENNETH L. DELASHAW, JR. PM</u>

12/15/2003	TEXT	Dec 15 2003 2:33:55:213PM <u>ORDER DENYING MOTION TO DISMISS /S/ KENNETH L. DELASHAW, JR.</u>
12/23/2003	TEXT	Dec 23 2003 4:15:27:410PM <u>RSPNT'S MOTION FOR CLARIFI- CATION</u>
01/12/2004	TEXT	Jan 12 2004 4:00:42:387PM <u>RSPNT'S WITNESS LIST</u>
01/13/2004	TEXT	Jan 13 2004 2:34:01:330PM <u>ORDER DENYING MOTION TO STAY (PRT)</u>
01/15/2004	TEXT	Jan 15 2004 4:36:38:800PM <u>EXHIBIT LIST OF RESPONDENT</u>
02/05/2004	TEXT	Feb 5 2004 3:41:55:010PM <u>COMPLAINANT'S WITNESS AND EXHIBIT LIST</u>
02/24/2004	TEXT	Feb 24 2004 3:24:03:640PM <u>OBJECTION TO RSPNT'S EXHIB- ITS</u>
03/03/2004	TEXT	Mar 3 2004 3:12:13:190PM <u>ORDER FOR CONTINUANCE (PRT)</u>
03/15/2004	TEXT	Mar 15 2004 4:56:02:950PM <u>RESPONDENT'S MOTION TO SUP- PLEMENT WITNESS AND EX- HIBITS LISTS</u>
03/22/2004	TEXT	Mar 22 2004 3:06:20:297PM <u>COMPLAINANT'S MOTION TO SUPPLEMENT EXH LIST</u>
03/23/2004	TEXT	Mar 23 2004 3:59:28:970PM <u>COMPLAINANT'S MOTION TO STRIKE WITNESSES</u>

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03/26/2004	ATBC	Mar 26 2004 2:47:16:800PM <u>TRIAL BRIEF OF COMPLAINANT</u>
03/29/2004	TEXT	Mar 29 2004 2:27:51:750PM <u>STIPULATIONS OF THE PARTIES</u>
03/30/2004	TEXT	Mar 30 2004 2:01:43:163PM <u>ORDER REGARDING PENDING MATTERS</u>
03/30/2004	TEXT	Mar 30 2004 2:02:40:847PM <u>PRETRIAL ORDER</u>
06/22/2004	TEXT	Jun 22 2004 2:31:02:503PM <u>MOTION TO SUPPLEMENT RECORD AND BRIEF IN SUPPORT THEREOF</u>
06/22/2004	TEXT	Jun 22 2004 3:09:44:343PM <u>COMPLAINANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW</u>
06/23/2004	TEXT	Jun 23 2004 10:27:37:807AM <u>RESPONDENT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW</u>
06/24/2004	TEXT	Jun 24 2004 2:15:51:903PM <u>RESPONSE TO RESPONDENT'S MOTION TO SUPPLEMENT RECORD</u>
07/01/2004	TEXT	Jul 1 2004 3:52:00:900PM <u>ORDER SUPPLEMENTING RECORD</u>
08/05/2004	TEXT	Aug 5 2004 2:45:26:693PM <u>REPORT OF TRIAL PANEL</u>
08/10/2004	TEXT	Aug 10 2004 9:36:11:927AM <u>JE: ORDER - WATT, CJ; BRIEFS SHALL BE FILED ACCORDING</u>

TO THE FOLLOWING SCHEDULE: COMPLAINANT'S BRIEF IS DUE AUGUST 30, 2004. RESPONDENT'S BRIEF SHALL BE FILED NOT MORE THAN 15 DAYS AFTER COMPLAINANT'S BRIEF IS FILED; COMPLAINANT MAY REPLY WITHIN 10 DAYS AFTER THE RESPONDENT'S BRIEF IS FILED. COPIES TO ATTYS

08/30/2004	ATBC	Aug 31 2004 1:07:28:830PM <u>COMPLAINANT'S BRIEF IN CHIEF</u>
08/31/2004	TEXT	Aug 31 2004 3:49:20:707PM RSPNDT'S MOT FOR STAY OF FURTHER PROCEEDINGS IN STATE DISCIPLINARY ACTION PENDING DETERMINATION OF APPEAL TAKEN FROM FED. COURTS DISMISSAL OF RESPONDENTS CIVIL RIGHTS ACTION
09/03/2004	TEXT	Sep 3 2004 2:01:34:437PM COMPLAINANT'S RESPONSE TO RSPDNT'S MTN FOR STAY OF FURTHER PROCEEDINGS IN STATE DISCIPLINARY ACTION PENDING DETERMINATION OF APPEAL TAKEN FROM FED CT'S DISM'L OF RSPDNT'S CIVIL RIGHTS ACTION
09/14/2004	AEAB	Sep 14 2004 4:32:20:047PM <u>RSPNT'S ANSWER BRIEF</u>
09/24/2004	ATRB	Sep 24 2004 3:44:14:630PM <u>COMPLAINANT'S REPLY BRIEF</u>

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09/24/2004	TEXT	Sep 24 2004 3:44:34:567PM COMPLNT'S APPL. TO ASSESS COSTS
09/24/2004	TRAN	Sep 24 2004 3:45:04:393PM Transcript BD VOL VOL 1 4-5-04 HEARING
09/24/2004	TRAN	Sep 24 2004 3:45:20:050PM Transcript BD VOL II 4-6-04 HEARING
09/24/2004	RCCT	Sep 24 2004 3:45:35:160PM Record to Court
11/10/2004	ASNJ	Nov 10 2004 3:44:29:620PM Assigned to Supreme Court
02/28/2005	TEXT	Feb 28 2005 3:12:36:06PM COMPLAINANT'S MOTION TO SUBSTITUTE COUNSEL
08/04/2005	TEXT	Aug 4 2005 3:57:30:483PM COMPLAINANT'S NOTICE OF THE COURT
08/04/2005	TEXT	Aug 24 2005 9:20:53:827AM ORDER RE-SETTING HEARING * * * * entry deleted as inadvertently docketed in wrong case * * * *
10/03/2005	TEXT	Oct 3 2005 3:16:43:887PM COMPLAINANT'S NOTICE TO THE COURT
11/09/2005	TEXT	Nov 9 2005 4:14:15:043PM COMPLAINANT'S NOTICE TO THE COURT

Report Generated by The Oklahoma Supreme Court
Network at January 31, 2006 10:09:57.

APPENDIX F

**IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA**

GLENN R. BEUSTRING,)
individually and as an attorney)
admitted to practice law in the)
State of Oklahoma and a member)
of the Oklahoma Bar Association,)
Plaintiff,)
versus)
(1) OKLAHOMA BAR ASSOCIA-) Case No.
TION, the agent and an official arm) CIV-03-1538-M
of the Supreme Court of Oklahoma,)
through its General Counsel, Dan)
Murdock; and (2) PROFESSIONAL)
RESPONSIBILITY TRIBUNAL,)
through its members, Kenneth L.)
Delashaw, Jr., Peggy Stockwell and)
Neil William McElderry, Jr.,)
Defendants.)

COMPLAINT

(Filed Nov. 5, 2003)

Plaintiff Glenn R. Beustring, as his claim for relief in this civil action for a declaratory judgment and permanent injunction, avers:

1. This action arises under the First Amendment to the Constitution of the United States, the "equal protection" clause of the Fourteenth Amendment to the Constitution of the United States, and the Civil Rights Act of 1871, 42 U.S.C. § 1983, as hereinafter more fully appears.

2. The Court has original jurisdiction of this action under 28 U.S.C. § 1343(a)(3) and (4), “[t]o redress the deprivation, under color of any State Law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens . . .” and “[t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights . . .,” and for a declaratory judgment and further relief under 28 U.S.C. §§ 2201(a) and 2202.

3. Plaintiff Glenn R. Beustring is a citizen of the United States, an attorney licensed to practice law in Oklahoma, and a member in good standing of the Oklahoma Bar Association.

4. The Supreme Court of Oklahoma has the constitutionally-invested, nondelegable power to regulate the practice of law in this State, including the discipline of legal practitioners.

5. In the exercise of that power, the Oklahoma Supreme Court adopted Rule 1.1 of the Rules Governing Disciplinary Proceedings [“RGDP”] which states that “it possesses original and exclusive jurisdiction in all matters . . . to discipline **for cause** any and all persons licensed to practice law in Oklahoma. . . .” (Emphasis added).

6. Rule 1.3, RGDP, provides that “[t]he commission by any lawyer of any act contrary to prescribed standards of conduct, whether in the course of his professional capacity, or otherwise, which act would reasonably be found to bring discredit upon the legal profession, shall be grounds for disciplinary action. . . .”

7. The Oklahoma Rules of Professional Conduct ("ORPC"), which were adopted on November 21, 1986, and subsequently modified by the Oklahoma Supreme Court, constitute the standard of professional conduct of all lawyers.

8. The Oklahoma Bar Association ("OBA") is the agent and an official arm of the Oklahoma Supreme Court.

9. Dan Murdock is, and was at all times relevant to this action, the General Counsel of the Oklahoma Bar Association.

10. Powers and duties in the area of discipline that were conferred and imposed on the General Counsel by the Oklahoma Supreme Court's adoption and promulgation of Rule 3.2, RGDP, include:

- (a) the power and duty to investigate all matters, involving possible misconduct of any lawyer called to the General Counsel's attention by complaint or otherwise;
- (b) the power and duty to report to the Professional Responsibility Commission the results of investigations made by or at the direction of the General Counsel,
- (c) the power and duty to make recommendations to the Commission concerning the institution of formal complaints for alleged misconduct; and
- (d) the power and duty to prosecute all proceedings under the RGDP.

11. The Professional Responsibility Commission of the Oklahoma Bar Association ("PRC") is a seven-member commission that was created by Rule 2.1, RGDP.

12. Powers and duties which the Oklahoma Supreme Court conferred and imposed on the PRC and which Rule 2.8, RGDP, expressly requires the PRC to exercise and perform include:

- (a) the power and duty to investigate any alleged ground for discipline . . . of any lawyer . . . called to its attention, or upon its own motion, and to take such action with respect thereto as shall be appropriate to effectuate the purposes of these Rules;
- (b) the power and duty, in its investigations, to hold hearings, and to administer oaths or affirmations, receive testimony and other evidence, and issue and serve or cause to be served subpoenas requiring testimony or the production of books, records, papers, documents or other tangible evidence;
- (c) the power and duty to require lawyers and other persons to respond or give testimony in connection with PRC investigations; and
- (d) the power and duty to adopt appropriate procedural rules governing the manner in which the PRC discharges its responsibilities.

13. Pursuant to Rule 6.6 RGDP, a trial panel was appointed by the Chief Master of the Trial Tribunal consisting of Kenneth L. Delashaw, Jr., Peggy Stockwell and Neil William McElderry, Jr. An answer date and trial date were set.

14. Physicians Liability Insurance Company ["PLICO"] is an Oklahoma corporation licensed to sell professional liability insurance in this State.

15. Michael P. Atkinson, Walter D. Haskins, William A. Fiasco, and Marthanda J. Beckworth are attorneys admitted to practice law in Oklahoma who are partners in the Atkinson, Haskins, Nellis, Holeman, Phipps, Brittingham & Gladd law firm in Tulsa ["the Atkinson-Haskins lawyers"]. At all times relevant to this action, the Atkinson-Haskins lawyers were acting as PLICO's agents and in their individual capacity.

16. On September 30, 2003, the OBA, acting through the PRC and its attorney, Assistant General Counsel Allen J. Welch, filed a bar complaint styled "STATE OF OKLAHOMA ex rel. Oklahoma Bar Association, Complainant, v. Glenn R. Beustring, Respondent," in the Office of the Chief Justice of the Oklahoma Supreme Court and numbered "OBAD #1590." A copy of that Complaint [hereafter "OBA Complaint"] is annexed hereto as "Exhibit A."

17. Paragraph 3 of the OBA Complaint states that "[t]his proceeding is brought pursuant to Rule 6, RGDP."

18. Rule 6.2, RGDP, states that "[t]he complaint shall set forth the specific facts constituting the alleged misconduct. . . ."

19. Rule 6.12(c), RGDP, provides that "[t]o warrant a finding against the Respondent in a contested case, the charge or charges must be established by clear and convincing evidence"

20. Before it filed the OBA Complaint against plaintiff, the PRC knew or had reason to know from the Office of the General Counsel of the OBA (a) that any pleading based on grievances presented to the General Counsel's Office on or about February 5, 2003, would be "contested" and (b) that to warrant an adverse finding

against plaintiff, each charge would have to be established **by clear and convincing evidence.**

21. The charges asserted against plaintiff Glenn R. Beustring in the OBA Complaint are based on "information and belief," not evidence, much less clear and convincing evidence.

22. The focus of charges asserted against plaintiff Glenn R. Beustring is the letter he wrote and had delivered to Justices Opala, Hodges, Lavender, Hargrave, Boudreau and Winchester on January 7, 2003, immediately after learning of the Oklahoma Supreme Court's summary denial of a petition for rehearing filed in a mandamus action which raised issues concerning (a) the trial court's failure to follow controlling precedent that authorized plaintiffs, on remand, to expand issues that had not been settled by the decision of the Court of Civil Appeals; (b) the trial court's refusal to allow discovery, authorized by 12 Okla.Stat. § 3226(B)(1), of "witness tampering" by PLICO-retained lawyers; (c) its not enforcing subpoenas duces tecum served on PLICO and the Atkinson-Haskins firm after making specific findings that the subpoenas had been validly served, but were not objected to in the manner ~~required~~ by 12 Okla.Stat. § 2004.1(D)(2); and (d) its sealing documentary evidence of "witness tampering" by members of the medical defense bar, without the required evidentiary showing, contrary to express provisions of 12 Okla.Stat. § 3226(C), the Open Records Act, 51 Okla.Stat. § 24A.1, and controlling precedent. The text of that letter, copies of which were delivered to Chief Justice Watt and Justice Summers that same day, reads as follows:

Please accept this letter as my resignation from the Oklahoma Bar Association effective sixty (60) days from this date so that I can arrange for the orderly transfer of existing clients to new counsel.

As a lawyer, I am statutorily obligated to respect you. Your denial of the Wilson's Petition for Rehearing leaves me without spiritual or physical ability to fulfill my statutory obligation. ***The facts were before you.*** You cannot indulge yourselves in the "three monkeys" game of choosing to ignore the evil. You should be impeached and not honored.

Your decision denying appropriate relief to victims of medical negligence – in this instance, the Wilsons – is an embarrassment to the "Rule of Law" – a repudiation ***of your duty*** to safeguard the rights of the public under the Oklahoma Constitution, Art. 2, §§ 6, 7 and 19. In the area of medical negligence law, evil lawyers and their "puppet" judges have flourished under your supervision.

Last Sunday, at church, my mother handed me an index card that said only these words: "To sin by silence when they should protest, makes cowards of men."

23. Specific facts constituting plaintiff's alleged misconduct were described as follows in the OBA Complaint:

Respondent's "resignation" was a subterfuge designed to secure a continuance of the trial setting. Respondent thereby effected a continuance which the trial court had denied him.

Respondent's conduct thereby violated Rules 3.5(d), 8.4(c) and 8.4(d), ORPC, and constitutes grounds for professional discipline.

Respondent's conduct . . . (specifically his comments that the Supreme Court was engaged in a game of "three monkeys," that the Supreme Court was "choosing to ignore the evil," that the Supreme Court should "be impeached and not honored," and that "'puppet' judges have flourished" under the supervision of the Supreme Court) violated Rule 8.2(a), ORPC, and Rule 1.3, RGDP, and constitutes grounds for professional discipline.

24. Rule 3.5(d), ORPC, provides that "[a] lawyer shall not . . . engage in conduct intended to disrupt a tribunal."

25. Rule 8.4(c), ORPC, provides that "[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . ."

26. Rule 8.4(d), ORPC, provides that "[i]t is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice . . ."

27. Rule 8.2(a), ORPC, provides that "[a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office." Provisions of Rule 1.3, RGDP, are quoted in paragraph 6, *supra*.

28. Statements made in the second and third paragraphs of plaintiff's letter to Justices Opala, Hodges, Lavender, Hargrave, Kauger, Boudreau and Winchester dated January 7, 2003, constitute speech on vital issues of self government protected by the First Amendment.

29. Plaintiff's exercise of protected rights under the First Amendment, as extended to the State of Oklahoma by the Fourteenth Amendment, was a substantial or motivating factor in the acts and omissions of Dan Murdock, members of his staff, and the PRC which led to the filing of the OBA Complaint, including the report and recommendation made by the General Counsel's Office concerning the institution of formal disciplinary proceedings against plaintiff.

30. At all times relevant to this action, defendants were acting under color of state law.

31. The Atkinson-Haskins lawyers played a significant role in the PRC's initiating disciplinary proceedings against plaintiff.

32. Although Dan Murdock saw the letter one Supreme Court Justice forwarded to him on January 7, 2003, the day it was written, the General Counsel's Office did not initiate disciplinary proceedings against plaintiff on its own motion. Such proceedings were triggered by the grievance which the Atkinson-Haskins lawyers filed on February 6, 2003. That grievance was filed without "probable cause" and for an "improper purpose."

33. The General Counsel's Office and the PRC accepted the Atkinson-Haskins lawyers' conclusory assertions as true instead of conducting appropriate independent investigations, including sworn statements setting out

specific facts that supported the complainants' collective conclusions.

34. Because the PRC had no evidentiary support for allegations quoted in paragraph 23, *supra*, its members knew or should have known that the OBA could not make a *prima facie* showing on charges that plaintiff was subject to professional discipline because he had engaged in fraudulent and disrespectful conduct that was prejudicial to the administration of justice, with intent to disrupt a tribunal, and brought discredit upon the legal profession, in violation of five separate Supreme Court Rules, by "speaking out" as he did on January 7, 2003.

35. Dan Murdock and other members of the General Counsel's staff knew or should have known of the Supreme Court's holding in *State ex rel. Oklahoma Bar Association v. Tweedy*, 2000 OK 37, ¶ 30, 52 P.3d 1003, 1009, that "[i]n the absence of a showing of falsity, the statements [that Tweedy made] must be held to be speech on vital issues of self government protected by the first amendment" and that without proof that statements in the January 7, 2003 letter were "false," the PRC was foreclosed from prosecuting plaintiff on grounds he violated Rule 8.2(a), ORPC. Nonetheless, the General Counsel's Office recommended that the PRC file formal charges against plaintiff.

36. Before the PRC filed the OBA Complaint, its members knew or should have been informed by the General Counsel's Office that in the face of controlling precedent enunciated in *Tweedy* and *State ex rel. Oklahoma Bar Association v. Porter*, 1988 OK 114, 766 P.2d 958, the PRC was foreclosed, as a matter of law, from charging plaintiff with violating Rule 8.2(a), ORPC, without proof that statements made in his January 7,

2003 letter were false. Moreover, when the Oklahoma Supreme Court adopted the “actual malice” standard enunciated in *New York Times v. Sullivan*, 376 U.S. 254 (1964), in *Porter*, as the standard to be used in attorney discipline cases that raised First Amendment issues, it implicitly recognized that Oklahoma has “a profound commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic and sometimes unpleasant sharp attacks on government and public officials.” *New York Times*, 376 U.S. at 270.

37. Given the Oklahoma Supreme Court’s holding in *State ex rel. OBA v. Porter*, 1988 OK 114, ¶ 11, 766 P.2d 958, 964, that “a disciplinary inquiry must concern itself with the issue of the factual basis for the criticism,” the failure of the PRC and the General Counsel’s Office to do so, e.g., the PRC’s basing its charge that plaintiff violated Rule 8.2(a), ORPC, on nothing more than “information and belief,” reflects a callous disregard for and deliberate indifference to plaintiff’s constitutional rights and constitutes evidence that the disciplinary proceedings instituted against plaintiff were brought in “bad faith” without “probable cause” for constitutionally impermissible reasons, in this case suppression of protected speech.

38. The General Counsel’s Office and the PRC knew or had reason to know, before the OBA Complaint was filed, that plaintiff had denied and would continue to deny that his January 7, 2003 letter was written, with fraudulent intent, for the purpose of securing a continuance of the January 13, 2003 trial setting in *Wilson v. Russell*, Tulsa County Dist Ct. No. CJ-95-2154.

39. The General Counsel's Office and the PRC knew or should have known, before the OBA Complaint was filed, that the judge presiding over *Wilson v. Russell* in the Tulsa County District Court allowed plaintiff to re-enter his appearance in that case, after he was unable to find competent counsel who were willing to appear as successor counsel for the Wilsons following a diligent effort to do so, and that the judge's doing so constitutes substantial evidence that she did not view plaintiff's "resignation" [as] a subterfuge designed to secure a continuance of the trial setting," as the PRC alleged.

40. The OBA Complaint was filed without "probable cause" and in "bad faith," with no real hope of ultimate success, under facially valid disciplinary rules for constitutionally impermissible reasons – that is, to retaliate against plaintiff for exercising his First Amendment right to criticize the Oklahoma Supreme Court's summary denial of the petition for rehearing filed in the mandamus action.

41. Plaintiff made the following statements in papers filed on August 20, 2003 in an original action, filed three weeks earlier, that asked the Oklahoma Supreme Court to vacate its decision in the mandamus action for "fraud on the court":

"Admission to the bar does not create a license to act maliciously, fraudulently, or knowingly tread upon the legal rights of others." *Newburger, Loeb & Co. v. Gross*, 563 F.2d 1057, 1080 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978). Nor did the State's issuance of a Certificate of Incorporation to Physicians' Liability Insurance Company ["PLICO"] authorize that indemnity company *to inject itself so deeply*

into the administration of justice as to repeatedly cause treating physicians who have a fiduciary relationship with their patients to change previously-stated opinions that are “critical” of PLICO insureds then, in derogation of express provisions in 12 O.S. § 2501, actively conceal[] such facts though they are relevant to the main issue in every malpractice action.

Record evidence before this Court in *Wilson v. Shallcross*, Okla. Sup. Ct. No. [“98,220” or “the mandamus action”] established a 17-year history of . . . PLICO-retained lawyers’ modifying or significantly altering, through “*pressure*” and “*influence*,” non-party treating physicians’ opinions on the main issues of his/her patient’s injury claim, beginning with the affidavit of Oklahoma attorney George Braley. PLICO said nothing about this incontrovertible fact nor any allegation that pertains to “changes” in the stories told by physicians who treated the plaintiff-patients in *Conterez*, *Dyer*, and *Renfroe*, as well as in this case, following *ex parte* conferences with PLICO-retained lawyers. Instead, PLICO began its brief with the following cynical remark: “*Counsel’s latest – but most assuredly not last . . . filing is a ‘Petition’ seeking to [vacate] this Court’s order in . . . 98,220, on grounds that this order was procured by ‘corrupt means.’*” See PLICO Motion at 1 (emphasis added). Although this two-pronged assertion is a focus-altering tactic designed to derail the principle thrust of this equitable proceeding, *at least each assertion is true.*

Petitioners’ counsel has resisted his clients’ request to take their case, as well as pertinent evidence of “witness tampering” in *Conterez*,

Dyer, Renfroe, and Vandawalker, to the “**court of public opinion**” via *60 Minutes*, *Prime Time, 20/20*, and the “*No-Spin*” zone on Fox News. Lead counsel will continue to resist the Wilsons’ request until **all** avenues of judicial relief have been exhausted, given the fact that the “**pattern and practice**” of *witness tampering* engaged in by PLICO and its agents is a matter of judicial cognizance and should be dealt with within the confines of the judicial process.

In pursuing this quest, petitioners’ lawyers will continue to make factually supported, legally warranted arguments in good faith, mindful of the fact that “[*t*]ampering with the administration of justice . . . involves far more than an injury to a single litigant. It is a wrong against the institution set up to protect and safeguard the public.” *Chambers v. NASCO, Inc.*, 501 [U.S.] 32, 44 (1991).

If courts fail to investigate allegations of witness tampering or recognize “corrupt endeavors to manipulate the administration of justice” for what they are and sanction lawyers for ~~unethical~~ or otherwise inappropriate or criminal conduct,” the result would be the same: . . . the ~~weakening~~ of an ethical adversarial system and the undermining of just administration of the law.” *Cf. United States v. Cueto*, 151 F.3d 620, 632 (7th Cir. 1998) (affirming lawyer’s conviction of obstruction of justice under 18 U.S.C. § 1503).

42. On September 15, 2003, the Oklahoma Supreme Court dismissed the “fraud on the court” action, without explanation.

43. The General Counsel’s Office knew or had reason to know of the filing of the “fraud on the court” action, the

brief filed in opposition to PLICO's motion to dismiss, the fact that virtually every "avenue[] of judicial relief ha[d] been exhausted," and the fact that plaintiff stated, in papers filed in the "fraud on the court" action on August 20, 2003, that once that happened, he would no longer "resist[] his clients' plan to take their case, as well as pertinent evidence of 'witness tampering' in *Conterez, Dyer, Renfroe and Vandawalker*, to the 'court of public opinion' via *60 Minutes, Prime Time, 20/20* and the "No-Spin" zone on Fox News."

44. The OBA Complaint was filed in "bad faith" with no real hope of ultimate success, under facially valid disciplinary rules for constitutionally impermissible reasons – that is, to intimidate, deter and suppress plaintiff and other similarly situated Oklahoma lawyers from exercising their constitutionally-protected rights, in the future, to make the injustice that is occurring in our courts visible, by utilizing the "**court of public opinion**," and thereby protect the public's First Amendment right to be informed on issues of public concern by those in daily contact with the judicial system.

45. The Oklahoma Bar Association, by and through its General Counsel and staff, deprived plaintiff of Equal Protection and Due Process, guaranteed by the Fourteenth Amendment, by recommending that the PRC file a formal complaint against plaintiff when the General Counsel's Office had no evidence, much less clear and convincing evidence, to support charges that plaintiff had violated Rules 3.5(d), 8.2(a), 8.4(c), and 8.4(d), ORPC, and Rule 1.3, RGDP.

46. Plaintiff has been deprived of his right to Equal Protection and Due Process under the Fourteenth

Amendment by accepting the unsubstantiated report and recommendation of the General Counsel's Office then, without conducting a proper "independent" investigation, voting to file a formal complaint against plaintiff without having "probable cause" to do so.

47. The probability that plaintiff will suffer irreparable harm from the OBA's "bad faith" prosecution, regardless of its outcome, if injunctive relief is not granted, is established by the PRC's failure to allege, much less show that statements plaintiff made in the "offending" letter were false, in the face of the Oklahoma Supreme Court's holdings in *Porter* and *Tweedy*. The filing of the OBA Complaint and scheduled prosecution of plaintiff has had and will continue to have a significant chilling effect on speech that cannot be avoided by proceedings before the PRT and the Oklahoma Supreme Court. Given the fact that those holdings are sufficiently clear for reasonable officials who serve in the General Counsel's Office or on the PRC to understand that filing the OBA Complaint would violate plaintiffs First Amendment right, their doing so constitutes evidence that the PRC and the General Counsel's Office have used facially valid disciplinary rules as instruments to suppress protected speech.

48. By invoking this Court's equitable jurisdiction under § 1983, plaintiff is seeking to protect his federal right not to be subjected to a "bad faith" prosecution or a prosecution brought for purposes of retaliation and intimidation, a right that cannot be vindicated by plaintiff's undergoing the prosecution. Until injunctive relief is granted, the prosecution itself will have a significant chilling effect on plaintiffs right of free speech and that of other Oklahoma lawyers.

49. As a result of defendants' violation of his constitutionally-protected right to freedom of speech and Equal Protection under the law, plaintiff has been required to retain counsel to defend the action against him and to seek the protection of this Court from an unconstitutional, "bad faith" prosecution. He seeks fees and such other relief as is proper under 42 U.S.C. § 1988.

WHEREFORE, plaintiff Glenn R. Beustring prays for a judgment (1) declaring the disciplinary proceedings against him in "bad faith" and without "probable cause" under color of state law – Rules 3.5(d), 8.2(a), 8.4(c) and (d) of the Oklahoma Rules of Professional Conduct and Rule 1.3 of the Rules Governing Disciplinary Proceedings, subjected or caused him to be subjected to the deprivation of rights secured by First Amendment and due process clause of the Fourteenth Amendment to the United States Constitution, (2) permanently enjoining the Oklahoma Bar Association, the General Counsel and other members of his staff and the Professional Responsibility Tribunal from taking any further action in OBAD #1590, including the Trial Panel's submitting a report or recommendation to the Oklahoma Supreme Court; and (3) awarding his fees and costs in this action pursuant to 42 U.S.C. §1988.

/s/ Murray E. Abowitz
Murray E. Abowitz,
OBA No. 000117
ABOWITZ, TIMBERLAKE
& DAHNKE, P.C.
P.O. Box 1937
Oklahoma City, Oklahoma 73101
Telephone : (405) 236-4645
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Attorney for Plaintiff

EXHIBIT A

**IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA**

STATE OF OKLAHOMA ex rel.)
Oklahoma Bar Association,)
Complainant,) OBAD #15 90
v.) SCBD #
GLENN R. BEUSTRING,)
Respondent)

COMPLAINT

(Filed SEP 30, 2003)

Complainant, State of Oklahoma ex rel. Oklahoma Bar Association, for its claim against Respondent, Glenn R. Beestring, alleges and states:

1. Respondent is a member of the Oklahoma Bar Association and is licensed to practice law by the Supreme Court of the State of Oklahoma. Respondent was so licensed at all times relevant to this Complaint.
2. To the best knowledge, information and belief of Complainant, Respondent has committed specific acts which constitute professional misconduct in violation of the Oklahoma Rules of Professional Conduct ("ORPC"), 5 O.S. ch. 1, App. 3-A (Supp. 1997), and are cause for professional discipline as provided in the Rules Governing Disciplinary Proceedings ("RGDP"), 5 O.S. ch. 1, App. 1-A (Supp. 1997). This standard of conduct, adopted and enforced by the Supreme Court of the State of Oklahoma, provides guidelines by which all attorneys are to practice law in Oklahoma.

3. This proceeding is brought pursuant to Rule 6, RGDP.

4. The official Oklahoma Bar Association roster address of Respondent is: Glenn R. Beustring, OBA # 768, Suite 1, 2624 East 21st Street, Tulsa, Oklahoma 74114.

COUNT I

5. Respondent represented plaintiffs in an action entitled *LaDonna Wilson and Eddie Wilson vs. S. Melanie Russell, M.D., et al.*, CJ-1995-2154, District Court of Tulsa County, Oklahoma.

6. On November 5, 1997, Respondent filed a Motion to Withdraw because the plaintiffs could not "receive a fair trial based on pretrial rulings made by the Court."

7. On November 18, 1997, the assigned Judge, the Honorable David Peterson, entered an Order allowing Respondent to withdraw. The Court also stayed the proceeding, for a period not to exceed sixty (60) days, until new counsel could make an Entry of Appearance.

8. On February 17, 1998, Respondent filed an Entry of Appearance thereby, in effect, re-entering his appearance.

9. The matter was subsequently tried to a jury which on June 18, 1999, entered a verdict for the defendants.

10. On July 12, 1999, Respondent filed a Motion for a New Trial.

11. On August 27, 1999, the trial court entered an Order denying the Motion for a New Trial.

12. On September 20, 1999, Respondent appealed that Order to the Supreme Court of Oklahoma (Case No. 93631).

13. The case was assigned to the Oklahoma Court of Civil Appeals, Division II, which on August 21, 2001, reversed the decision of the trial court and remanded the matter back to District Court.

14. Upon remand, the matter was assigned to the Honorable Deborah Shallcross of the District Court of Tulsa County, Oklahoma.

15. On November 17, 2003, the trial court entered an Order setting the matter for jury trial to commence on January 13, 2003.

16. Respondent objected to the trial setting and repeatedly sought to have the trial continued.

17. On December 16, 2002, Respondent filed with the trial court an **Emergency Application to Strike** the trial scheduled January 13, 2003.

18. On December 26, 2002, Respondent filed with the trial court a **Second Motion to Strike Trial**.

19. On January 3, 2003, Respondent filed with the trial court a **Third Motion to Strike Trial**.

20. Contemporaneous with those efforts, Respondent also sought a continuance of the trial setting from the Supreme Court of Oklahoma. On December 31, 2002, Respondent filed with the Supreme Court an **Application to Strike** the trial setting and to stay all District Court proceedings in the Wilson matter (Case No. MA-98650).

21. Respondent had also filed on September 6, 2002, an Application to Assume Original Jurisdiction and Petition for Writ of Mandamus with the Supreme Court of Oklahoma (Case No. MA-98220).

22. On November 12, 2002, the Supreme Court issued a Writ of Mandamus commanding Judge Shallcross to vacate a portion of her Order which concerned discovery. The Supreme Court denied all other requests for relief.

23. On December 2, 2002, Respondent filed a Petition for Rehearing regarding the Order of November 12, 2002.

24. On January 7, 2003, the Supreme Court entered an Order denying Respondent's Petition for Rehearing.

25. That afternoon, Respondent hand-delivered a letter addressed to the Supreme Court of Oklahoma. Therein, Respondent tendered his resignation from the Oklahoma Bar Association "effective sixty (60) days from this date so that I can arrange for the orderly transfer of existing clients to new counsel." Respondent continued:

"As a lawyer, I am statutorily obliged to respect you. Your denial of the Wilson's Petition for Rehearing leaves me without spiritual or physical ability to fulfill my statutory obligation. The facts were before you. You can not indulge yourselves in the "three monkeys" game of choosing to ignore the evil. You should be impeached and not honored. (The Supreme Court's Order) is an embarrassment to the "Rule of Law" – a repudiation of your duty to safeguard the rights of the public . . . In the area of medical negligence law, evil lawyers and their "puppet" judges have flourished under your supervision."

26. On January 8, 2003, Respondent appeared before a referee of the Supreme Court at a hearing on his application in Case No. MA-98650, for an emergency stay of the trial setting in Tulsa County District Court. At that time, Respondent advised the Referee and opposing counsel that he had tendered a letter resigning from the practice of law.

27. That afternoon, the Chief Justice of the Supreme Court of Oklahoma entered the following Order: "Based upon the representation of Glenn R. Beustring, counsel for the plaintiffs, (1) that he has filed an application to withdraw as attorney in this case, No. CJ-95-2154, La Donna Wilson and Eddie Wilson, plaintiffs, v. S. Melanie Russell, M.D., et al. defendants, and (2) that he has sent a letter to this Court withdrawing from the practice of law, this Court grants an emergency stay of the trial scheduled to begin January 13, 2003."

28. On January 22, 2003, Respondent hand-delivered to the Supreme Court of Oklahoma his "request to withdraw (his) resignation dated January 7, 2003."

29. On February 28, 2003, Respondent filed an Entry of Appearance in the Tulsa County action thereby, in effect, re-entering his appearance.

30. Respondent served as counsel for the plaintiffs in the Tulsa County action which proceeded to trial on July 7, 2003.

31. Respondent's "resignation" was a subterfuge designed to secure a continuance of the trial setting. Respondent thereby effected a continuance which the trial court had denied him.

32. Respondent's conduct thereby violated Rules 3.5(d), 8.4(c) and 8.4(d), ORPC, and constitutes grounds for professional discipline.

33. Respondent's conduct thereby (specifically his comments that the Supreme Court was engaged in a game of "three monkeys," that the Supreme Court was "choosing to ignore the evil," that the Supreme Court should be "impeached and not honored," and that "puppet" judges have flourished" under the supervision of the Supreme Court) violated Rule 8.2(a), ORPC, and Rule 1.3, RGDP, and constitutes grounds for professional discipline.

WHEREFORE, premises considered, Complainant, Oklahoma Bar Association, prays that Respondent, Glenn R. Beustring, be disciplined as this Court finds equitable and proper, and that this Court enter such other relief as it finds appropriate.

Done by the direction of the Professional Responsibility Commission this 30th day of September 2003.

/s/ Louise Brown
Louise Brown
Chairperson
Professional Responsibility
Commission

/s/ Allen J. Welch
Allen J. Welch, OBA #11187
Assistant General Counsel
Oklahoma Bar Association
1901 N. Lincoln, P.O. Box 53036
Oklahoma City, Oklahoma 73152
(405) 416-7007

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 30th day of September, 2003, a true and correct copy of the foregoing Complaint was mailed, by certified mail and restricted delivery to: Glenn R. Beustring, Suite 1, 2624 East 21st Street, Tulsa, Oklahoma 74114; and by regular mail to J. Daniel Morgan, Suite 1100, 100 W. Fifth Street, Tulsa, Oklahoma 74103-4219.

/s/ Allen J. Welch
Allen J. Welch
